Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00763-CR & 14-98-00764-CR

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LEROY HENDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 763,935 and 763,936

O P I N I O N

Leroy Henderson appeals his convictions by a jury for aggravated sexual assault of a child under fourteen years of age and sexual assault of a child under seventeen years of age. The jury assessed his punishment at 50 years imprisonment for aggravated sexual assault of T.R., and 20 years for sexual assault of A.R. In one point of error, appellant contends the trial court erred in admitting into evidence an unadjudicated extraneous offense at the guilt/innocence stage. We affirm.

Appellant was charged with the aggravated sexual assault of his granddaughter, T.R., and with sexual assault of his other granddaughter, A.R. Because appellant challenges only the

admission into evidence of an unadjudicated sexual assault on his daughter at the guilt/innocence stage, a recitation of the facts is unnecessary.

Appellant filed a discovery motion asking that the State furnish him a list of all extraneous offenses it intended to introduce to prove motive, opportunity, intent, preparation, plan, and/or knowledge. Four days before the trial, the State furnished appellant a notice that it intended to use evidence of an unadjudicated sexual assault by appellant of his daughter. Before the trial commenced, appellant objected to any attempts by the State to introduce evidence of this offense during the guilt/innocence stage on the grounds that the only purpose such evidence would serve would be to show appellant was a "general criminal." Appellant did not object to timeliness of the notice, or the relevancy of the evidence, but only asked that the State specify the purpose of the evidence other than "boiler plate" language of motive, intent, etc. The prosecutor initially informed the trial court that they had given notice under rule 404(b), Texas Rules of Evidence, that they intended to present evidence of a sexual assault by appellant on his daughter, L.G.. The prosecutor explained that appellant's daughter made a report to the police of the sexual assault, and that evidence of this assault "shows intent, plan, motive, absence of a scheme, any of those theories in which 404(b) evidence comes." The trial judge advised appellant he would admit the evidence. Appellant did not make a rule 403 objection to the effect that the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." TEX. R. EVID. 403.

After hearing the testimony of appellant's granddaughter, and a nurse who examined A.R., the State called appellant's daughter L.G. as its next witness. Out of the presence of the jury, the prosecutor told the trial court that the credibility of the child witnesses was in issue because no one would believe they had been sexually assaulted by their grandfather. Appellant told the court he still objected to it, without specifying any grounds for the objection. Thereafter, L.G. testified that after they returned to appellant's house from a fish-fry, appellant had taken her into a bedroom and sexually assaulted her. After assaulting his daughter, appellant told L.G.: "I'm a sick m-----f-----, aren't I?" Appellant's trial counsel attempted to

discredit L.G. by getting her to state that her ex-boy friend did not believe her, and that she broke up with him because he did not believe her.

Appellant's wife testified that the child victims had robbed her, and had run away to Arizona. She stated she did not know anything about the allegations made by appellant's grandchildren concerning his sexual assaults on them, and on his daughter.

Appellant testified that he did not sexually assault his granddaughter or his daughter.

In his sole point of error, appellant contends trial court erred in admitting the evidence of appellant's sexual assault on L.G., and that the error was harmful. Appellant argues that the offense was introduced solely to characterize the appellant as a sexual deviant in order to show that he acted as such on the occasions in question.

If the opponent of extraneous offense evidence objects on the grounds that the evidence is not relevant, violates Rule 404(b), or constitutes an extraneous offense, the proponent must satisfy the trial court that the extraneous offense evidence has relevance apart from its character conformity value. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex.Crim.App.1990) (opinion on reh'g). If the trial court determines the evidence has no relevance apart from supporting the conclusion that the defendant acted in conformity with his character, it is absolutely inadmissible. *Id*. On the other hand, extraneous offense evidence is admissible if the proponent persuades the trial court that [the extraneous offense evidence] tends to establish some elemental fact, such as identity or intent; that it tends to establish some evidentiary fact, such as motive, opportunity or preparation, leading inferentially to an elemental fact; or that it rebuts a defensive theory by showing, e.g. absence of mistake or accident . . . [or] that it is relevant upon a logical inference not anticipated by the rule makers. *Montgomery*, 810 S.W.2d at 387-388; *see also Taylor v. State*, 920 S.W.2d 319, 321 (Tex.Crim.App.1996). As long as the trial court's ruling was within the zone of reasonable disagreement, there is no abuse of discretion and the trial court's ruling will be upheld. *Montgomery*, 810 S.W.2d at 391. *See also Santellan v. State*, 939 S.W.2d 155, 168-169 (Tex.Crim.App. 1997).

Once the trial judge has ruled on whether the evidence is relevant beyond its character conformity value, he has ruled on the full extent of the opponent's Rule 404(b) objection. *Montgomery*, 810 S.W.2d at 388. The opponent must then make a further objection based on rule 403, in order for the trial judge to weigh the probative and prejudicial value of the evidence. *Id.* If appellant fails to object based on rule 403, he waives his complaint on appeal that the evidence was unfairly prejudicial. TEX. R. APP. P. 33.1(a); *Montgomery*, 810 S.W.2d at388-89; *Peoples v. State*, 874 S.W.2d 804, 809 (Tex.App.--Fort Worth 1994, pet. ref'd).

Assuming *arguendo* appellant's objection was sufficient to preserve error as to the admissibility of the sexual assault on appellant's daughter, he has waived any complaint of undue prejudice by failing to make a rule 403 objection. *Peoples*, 874 S.W.2d at 809. In this case, the State gave written notice of its intention to use the unadjudicated sexual assault on appellant's daughter as part of its evidence in chief to prove appellant's intent to commit sexual assaults on his granddaughter. The State informed appellant of this in writing, and explained why the evidence was necessary to its case before the daughter testified. The State explained before the trial commenced and before the daughter testified that the credibility of the minor victims was in issue, and that the sexual assault on his daughter would be evidence of his intent to assault the minor victims.

Appellant's counsel cross-examined the two minor victims extensively about taking personal items belonging to their step-grand-mother, such as perfume and jewelry. On cross-examination, T.R. stated she never told her step-grandmother about the assault because "she [the step-grandmother] wouldn't believe her [T.R.]." T.R. also stated she never told other friends about the incident. A.R. stated she was reluctant to tell others about the incident, and admitted taking some perfume. A.R. stated she and T.R. called their brother, Nathan, and asked him for help in getting away from their grandparents home. Nathan called a friend, Donna Golden , and related to her what A.R. and T.R. had said, and Donna Golden, and her husband, picked up T.R. and A.R. at their grandparents' home. Neither of the victims had reported the incidents to the police nor had they called a doctor. A.R. and T.R. left their grandparent with Donna Golden, and told her of the incident. Ms. Golden called the police and reported both

assaults, and she took A.R. to Northeast Medical Center where A.R. was examined for sexual assault by Mary Belinda Walls. Based on her extensive examination of A.R., Ms. Walls testified that A.R. had been sexually assaulted.

In *Montgomery*, the court of criminal appeals found that extraneous acts by the defendant in walking around naked before his daughters with an erection were admissible to show appellant's intent in that case of a later sexual assault on his daughters. The court of criminal appeals stated:

> It is at least subject to reasonable debate whether the testimony that appellant frequently walked around in front of his daughters naked and with an erection, in combination with other evidence of inappropriate behavior toward them, did have a tendency to show a generalized "intent to arouse and gratify" his own sexual desire *vis-a-vis* his children. This in turn would support an inference that, if he did in fact touch his daughters' genitals with his hand on the occasions alleged, it was a specific manifestation of that same intent to arouse and gratify his sexual desire, an elemental fact in these prosecutions.

Montgomery ,810 S.W.2d at 394.

Under *Montgomery*, such extraneous sex offenses would be admissible as relevant, because it would have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. *Id.* at 387-388. Reading rule 404(b) in light of rule 401 and rule 402, if evidence (1) is introduced for a purpose other than character conformity, (2) has relevance to a "fact of consequence" in the case, and (3) remains free of any other constitutional or statutory prohibitions, it is admissible. *Rankin v. State*, 974 S.W.2d 707, 709 (Tex.Crim.App. 1996).

The mere fact that a party introduces evidence for a purpose other than character conformity, or any of the other enumerated purposes in rule 404(b), does not, in itself, make that evidence admissible. *Id*. Admissibility of evidence under rule 404(b), in fact, also hinges on the relevancy of the evidence to a "fact of consequence" in the case. *Id*. When a party makes a 404(b) objection, they are claiming that evidence is being introduced solely for character conformity or, in other words, that the evidence is irrelevant to anything other than

character conformity. *Id*. A rule 404(b) objection demands a relevancy analysis. *Id*.

Under *Montgomery*, a "fact of consequence" includes either an elemental fact or an evidentiary fact from which an elemental fact can be inferred. *Rankin,* 974 S.W.2d at 709-710. In *Rankin,* the court of criminal appeals held that this court erred in holding extraneous evidence of sexual assaults on other minor children admissible to show "common scheme or plan" and remanded the case to this court for consideration of whether the extraneous offense testimony was relevant to a fact of consequence. *See Rankin v. State,* 995 S.W.2d 210, 213 (Tex.App.–Houston[14th Dist.] 1999, pet. ref'd). The court of criminal appeals suggested that the extraneous acts could have been admitted as relevant to show the appellant's intent. *Rankin,* 974 S.W.2d at 709-710 (testimony that the appellant sexually molested two girls just before he molested the complainant makes it more likely that appellant did not act accidentally, but with intent). On remand, this court ruled accordingly that the extraneous acts were relevant to prove guilty intent. *Rankin,* 995 S.W.2d at 213.

In this case, appellant's defensive theory was that he was innocent, and the minor victims fabricated the story (1) to cover up the theft of jewelry and perfume, and (2) to have good reasons to go back to Arizona. Accordingly, intent was an elemental fact of consequence and the extraneous offense of appellant's assault on his daughter was admissible as relevant to show appellant's intent when he assaulted his granddaughters. *Rankin*, 974 S.W.2d at 709-710.

The extraneous act was also admissible in rebuttal of appellant's defensive theory that he did not commit these crimes. *See Creekmore v. State,* 860 S.W.2d 880 (Tex.App.–San Antonio 1993, pet. ref'd). Appellant unequivocally denied sexually assaulting T.R., A.R., and his daughter, T.G., after the State presented its case in chief and evidence of the extraneous assault on T.G. The premature receipt of extraneous offense evidence may be rendered harmless by a defendant's subsequent actions at trial. *Siqueiros v. State*, 685 S.W.2d 68, 72 (Tex.Crim.App.1985); *Rubio v. State*, 607 S.W.2d 498, 502 (Tex.Crim.App.1980); *Howland v. State*, 966 S.W.2d 98, 104(Tex.App.-Houston[1st Dist.] 1998), *aff'd*, 990 S.W.2d 274 (Tex.Crim.App. 1999). We find the error, if any, of the trial court's admission of the evidence

during the State's case in chief was rendered harmless by appellant's subsequent testimony denying that he sexually assaulted his daughter and granddaughter. We further find the evidence in this case was admissible as relevant to appellant's intent in sexually assaulting his minor granddaughter, and to rebut his defensive theory that he did not commit these crimes. We hold that the trial court did not abuse its discretion in admitting the testimony of appellant's sexual assault of his daughter. Appellant's sole point of error is overruled.

We affirm the judgment of the trial court.

PER CURIAM

Judgment rendered and Opinion filed March 2,2000.

Panel consists of Justices Robertson, Sears, and Cannon.[1]

Do Not Publish–TEX. R. APP. P. 47.3(b).

[1] Justices Sam Robertson, Ross A. Sears, and Bill Cannon sitting by assignment.